

**Interested Party Comments and Staff Responses**

**Regulation 5070, subdivisions (f) and (g)**

Interested Party Comment - Eric Miethke:

Although Mr. Miethke has stated no objection to the revisions being proposed for Regulation 5070, he believes that the regulation should be amended further to address whether the list of agencies included in the definition of "Department," in subdivision (f), are appropriately parties before the Board as provided in subdivision (g). As currently drafted, subdivision (g) defines the term "party" as "the taxpayer and the taxpayer's representative; and the Department as defined in [subdivision f]." In a letter dated October 10, 2003, Mr. Miethke states that other agencies should not be designated as parties, but he does "not suggest that they be excluded from participating in hearings." Mr. Miethke's suggestion is to allow other agencies "to participate, but to give them some other status allowing them input without treating them the same as the staff of the Board of Equalization and the taxpayer." Mr. Miethke's concern arises from a case in which another agency brought suit against the Board of Equalization to overturn a decision made by the Board in favor of a taxpayer.

Staff Response:

At least since the adoption of the Rules of Practice, the listed Departments have been regarded as parties before the Board. Staff is unclear in what capacity Mr. Miethke would have these Departments participate in appeals involving taxes and fees that the Board administers for or with these Departments. Staff notes that changing the "party" designation of these Departments to some other status will not preclude the filing of suits to seek judicial review of Board decisions that impact these Departments. (See generally, *Westly v. PERS Board of Administration*, 105 Cal. App. 4<sup>th</sup> 1095 (2003) and *State Personnel Board v. Department of Personnel Administration*, 111 Cal. App. 4<sup>th</sup> 839 (2003).)

**Regulations 5082 and 5082.1**

Interested Party Comment – Joseph Vinatieri:

Mr. Vinatieri is not opposed to the currently proposed amendment to Regulation 5082.1; however, Mr. Vinatieri believes that additional amendments to Regulations 5082 and 5082.1 are necessary to provide better procedures regarding the rehearing process in both Business Tax and Franchise Tax Board matters.

Staff Response:

Staff agrees that the rehearing procedures should be reviewed and revised to provide further guidance regarding the rehearing process. Staff will work with Mr. Vinatieri and other interested parties to draft amendments for future consideration by the Board.

**Regulations 5091 and 5093**

Interested Party Comment - Eric Miethke:

Mr. Miethke has proposed either repealing the Taxpayers' Bill of Rights or reopening the discussion of whether taxpayers who have not had a matter decided by the Board Members have the right to file a Taxpayers' Bill of Rights reimbursement claim. In an October 19, 2003 letter, Mr. Miethke provided the following comment:

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“Staff does not correctly state the law ... They state:

‘ ... the Board determined that the line should be drawn for purposes of section 7091 reimbursement between cases that were resolved by staff and cases in which a taxpayer was forced to appeal to the board members in order to get relief.’

“In fact, a taxpayer must not only appeal to the members of the Board, but must actually have a decision by the Board in the taxpayer’s favor, as well as a finding by the Board that the staff acted unreasonably. All I pointed out is staff can easily defeat a reimbursement claim by conceding a case literally, ‘at the Board room steps’ even if the staff acted completely unreasonably up to that point and the taxpayer incurred tens of thousands of dollars of unnecessary expense.

“As someone who was one of the principal drafters of the Taxpayers Bill of Rights, I can tell you that this possibility was not intended either by the author or the sponsors of the bill. Instead, the statutory language staff misconstrues was meant to distinguish between taxpayer costs incurred during an unreasonable audit (unrecoverable), and those coming after the appeal was filed (recoverable).

“At the interested parties meeting I suggested that virtually no one should be able to recover damages administratively under the current interpretation, and therefore the section should be repealed. Ironically, the staff’s interpretation leaves only one possibly viable opportunity for recovery: a lawsuit under section 7099 for reckless disregard of established board-published procedures. I might point out that the encouragement of such lawsuits as a substitute also exposes the Board to payment of reasonable litigation costs.”

**Staff Response:**

Prior to adopting the Taxpayers’ Bill of Rights Reimbursement Claims regulations in 1997, the Board gave careful consideration to Mr. Miethke’s arguments regarding this issue and determined not to accept his interpretation of Revenue and Taxation Code section 7091. Mr. Miethke’s main argument, then as now, is that he knows what the author and sponsors intended when the Taxpayers’ Bill of Rights was drafted. If the author did have the claimed intent, there would have been clear ways to express that intent. For example, using Mr. Miethke’s own terms from the argument above, the statute could have read: “Every taxpayer is entitled to be reimbursed for any reasonable fees and expenses related to an appeal filed with the board.” Instead the statute reads: “Every taxpayer is entitled to be reimbursed for reasonable fees and expenses related to a hearing before the board ....” Taxpayer Bill of Rights Reimbursement Claims are limited to taxpayers who prevail in a hearing before the Board. Allowing taxpayers who prevail at the staff level to file Taxpayer Bill of Rights Reimbursement Claims exceeds the scope of the statute authorizing the payment of fees and expenses by the Board.